In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-601

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 501 F. 2d 908. The opinion of the district court (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on July 24, 1974. A timely petition for rehearing was denied on August 27, 1974. The petition for a writ of certiorari was filed on November 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the doctrine of primary jurisdiction requires a district court to suspend proceedings in a suit commenced by the Commission to enjoin an unauthorized abandonment, until the Commission has considered the merits of the railroad's pending abandonment application.

2. Whether the Commission may seek to enjoin an unauthorized abandonment without first ordering another carrier to undertake the abandoned service.

STATUTES INVOLVED

Sections 1(18) and 1(20) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1, *et seq.*, and Section 601(e) of the Regional Rail Reorganization Act of 1973, 87 Stat. 1021, are set out in the petition for a writ of certiorari (Pet. 3-7).

STATEMENT

This case involves the unauthorized abandonment of operations over a thirty-nine mile line of track in Nebraska (the Ruskin Line) by petitioner Chicago, Rock Island & Pacific Railroad Co. (Rock Island). For several years the Rock Island had contemplated seeking authorization from the Commission to abandon the Ruskin Line, although that line consistently returned a profit (Pet. App. B, pp. 26-28). The Rock Island accordingly reduced the line's maintenance expenditures to the point where it was in "deplorable condition" (*ibid.*). Unusual weather conditions in the winter of 1973 rendered the deteriorating track unsafe and led petitioner to terminate service over the Ruskin Line on March 2, 1973 (Pet. App. B, pp. 24-26).

Although weather conditions would have permitted restoration of the line to operable condition in May or

June 1973, the Rock Island made no attempt to repair the line (Pet. App. F, pp. 57-58), and on May 5, 1973, the Nebraska Public Service Commission filed suit under Section 1(20) of the Interstate Commerce Act, seeking to enjoin the abandonment unless appropriate permission were obtained from the Interstate Commerce Commission. The Rock Island subsequently filed an application with the Commission seeking authority to abandon the line. The Commission commenced proceedings in regard to that application; in August 1973, the Commission also filed suit under Section 1(20) seeking an injunction to compel Rock Island to restore service pending a final determination of its abandonment application.

The Commission's suit was consolidated with Nebraska's suit. The district court indicated that it was "inclined to the view that there has been an unlawful abandonment * * * as of about May or June, 1973, when weather conditions would have permitted a restoration but the railroad company decided not to restore it for financial reasons" (Pet. App. A, p. 20). However, the district court concluded that the doctrine of primary jurisdiction required it to stay its hand until factual and legal issues concerning the propriety of the abandonment had been submitted to the Commission. Accordingly, it dismissed the actions pending the outcome of the abandonment proceedings before the Commission (Pet. App. A, pp. 20-21).

The court of appeals held that the doctrine of primary jurisdiction ordinarily is inapplicable to actions brought under Section 1(20), and that nothing in the facts of this case altered that outcome (Pet. App. B, pp. 28-30). It remanded the case to the district court "to make factual findings and determine in the first instance whether an injunction should issue" (Pet. App. B. p. 31).

The Rock Island filed a petition for rehearing (Pet. App. D, pp. 41-49), alleging for the first time that Section 601(e) of the Regional Rail Reorganization Act of 1973, amending Section 1(16) of the Interstate Commerce Act, was "an additional reason" why the primary jurisdiction doctrine should be invoked (Pet. App. D, p. 47). The court of appeals denied the petition without opinion.

On October 31, 1974, the district court concluded on remand that the Rock Island "abandoned the branch line with intent not to return it to use unless ordered to do so"; that the abandonment had resulted and will result in substantial and irreparable harm to shippers; and that the failure to restore service on the Ruskin Line "was not for reasons entirely beyond the railroad company's control" because the Rock Island had continued to make a profit on this line while failing adequately to maintain the facilities (Pet. App. F, pp. 58-61). The court consequently held that service should be restored.[1]

On December 13, 1974, the district court denied the Rock Island's motion for stay or, in the alternative, for leave to offer additional evidence. The court then entered a preliminary injunction that ordered the Rock Island forthwith to make repairs necessary to restore service over the line at least as satisfactory as that provided just prior to cessation of service.

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[1]The petition for a writ of certiorari to review the judgment of the court of appeals was filed after the district court's decision on remand.

ARGUMENT

1. It has long been established that it is exclusively for the courts to determine whether an unlawful abandonment has occurred, and whether it should be enjoined; "[t]he remedy provided by § 1(20) is clearly inconsistent with a proceeding before the commission to attain the same end." *Powell v. United States*, 300 U.S. 276, 288. Section 1(20) provides that an injunction may issue if the carrier has abandoned without the Commission's permission. The threshold issues are whether there has been an abandonment, and whether the Commission has authorized that abandonment. Neither factor calls for the exercise of the Commission's expertise, nor is there a role for the Commission's judgment, which is confined (under Section 1(18)) to determining whether an application for abandonment is consistent with the public convenience and necessity. Therefore the courts consistently have decided all questions relating to the issuance of a Section 1(20) injunction without referring them to the Commission. See, *e.g.*, *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266, 271-274; *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U.S. 299; *Meyers* v. *Jay Street Connecting R.R.*, 259 F. 2d 532 (C.A. 2). And, indeed, as the court below recognized (Pet. App. B, p. 28), that a Section 1(20) "suit may be maintained at the instance of the Commission is a strong indication that such matters are properly determined by the courts." Referral to the Commission under the primary jurisdiction doctrine is not appropriate.[2]

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[2]The decision of the court below that the doctrine of primary jurisdiction is not applicable is consistent with other recent lower court decisions. See *Interstate Commerce Commission* v. St. Johnsbury & L.C.R.R., Civ. No. 73-3 (D. Vt., decided January 31, 1973); *Interstate Commerce Commission* v. *Maine Central R.R. Co.*, Civ. 74-81 (D. Vt., decided July 18, 1974); *Interstate Commerce Commission* v. *Maine Central R.R. Co.*, No. 74-2062 (C.A. 2, decided October 22, 1974).

The decision in *United States* v. *Western Pacific Railroad,* 352 U.S. 59, is not to the contrary. There the Court held that primary jurisdiction applies when "enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body * * *" (*id.* at 63-64). But here, the court of appeals properly concluded, "there are no issues requiring the views of the administrative agency" (Pet. App. B, p. 30). The only legal issue presented—whether there has in fact been an abandonment—is a question for the courts. So, too, the factors relating to the district court's discretionary decision whether to issue an injunction, including the strong congressional policy and substantial public interest in not permitting abandonment of railroad service without Commission approval, the equity of requiring expenditures when the Commission may subsequently approve the abandonment application, and the deliberate neglect of essential maintenance by the railroad (*id.* at 31-34), are not matters in regard to which the Commission has any special expertise.

Moreover, application of the primary jurisdiction doctrine to Section 1(20) cases would render Section 1(20) meaningless, since a formal Commission decision on whether abandonment should be authorized would be required before any injunctive relief could be entered and in the interim rail operations would cease. Section 1(18) was intended to reflect quite the contrary rule: abandonment was forbidden until the Commission found that it should be authorized. Section 1(20) allows the courts to enforce that rule. Application of the primary jurisdiction doctrine would preclude such interim enforcement.

2. Petitioner also contends that Section 601(e) of the Regional Rail Reorganization Act of 1973 affects the present proceeding. Petitioner apparently believes that because Congress has authorized the Commission, in its own discretion and on its own initiative, to provide for a brief period of emergency service when, among other things, a railroad's cash position makes it impossible to continue operations, Congress has altered the definition of "unlawful abandonment."

This case, however, does not fall within the terms of Section 601(e). That section applies only when continuing operation of a line becomes "impossible" because of the railroad's inability to operate. But petitioner does not contend that restoration of service over the Ruskin Line would be impossible; it simply asserts that restoring service is "economically unfeasible" (Pet. 15). The feasibility of restoring service, balanced against petitioner's neglect (which has increased the cost of restoration), is a factor to be considered in determining whether the district court should issue an injunction (Pet. App. B, pp. 33-35). But because the question in this case is one of economic priorities rather than of operational impossibility, Section 601(e) is inapplicable.

Moreover, there is nothing in the statute or the legislative history to support Rock Island's contention that Section 601(e) modifies the standards for issuing a Section 1(20) injunction. The purpose of Section 601(e) was to avoid "transportation chaos and economic disaster" by assuring "the continuance of essential rail service in the Northeast and Midwest region in case one or more of the seven railroads presently in reorganization under section 77 of the Bankruptcy Act ceases operations prior to the adoption, approval, and implementation of the final system plan" (S. Rep. No. 93-601, 93d Cong.,

1st Sess. 52, 53). Although the inclusion of this statutory provision in the Interstate Commerce Act may well give the Commission the same authority to cope with future transportation emergencies, it is limited to situations where the economic collapse of a railroad, or some other disaster, brings about the cessation or major disruption of a railroad's operations. The statute has no application to the unlawful abandonment of a single branch line by an operating railroad, which abandons the line because of its desire to save money.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3]In any event, the remedy under Section 601(e) lies within the Commission's discretion. By bringing this suit the Commission has elected to pursue its remedies under Section 1(20) rather than exercise whatever options it may have had under Section 601(e). Petitioner is not entitled to set up this election as a defense to the Section 1(20) action.